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Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER D. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Christopher David Banks, Pro SE
Inmate # 07073-032
Talbert House
2216 Vine Street
Cincinnati, Ohio 45202
(513) 608-1211

51 pp

QUESTIONS PRESENTED

(1) Was Christopher Banks entitled to a new trial when his Fifth Amendment rights were violated by the prosecutor's improper introduction of information of the defendant's refusal to talk to the FBI until he had talked to his attorney during the government's case in chief and by introduction of false and misleading statements during the government's rebuttal closing argument.

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PETITION FOR WRIT OF CERTIORARI

Christopher David Banks respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Sixth Circuit entered and filed on April 5th, 2002.

OPINION BELOW

United States v. Christopher Banks, No. 00-6335(6th Cir. Feb. 5th, 2001), Memorandum Opinion (attached as Appendix "A"), Order on Petition for rehearing en banc (attached as Appendix "B").

JURISDICTION

This Court has jurisdiction under 28U.S.C. §1254(1) and the petition is timely under Supreme Court Rule 13.4. Defendant-Appellant was granted an extension of time in which to file this petition until September 3rd, 2002 due to medical conditions (open heart surgery) and this date was extended for 60 days to allow the Defendant to make necessary changes to the format of his petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amendment v provides that "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." *See* Appendix D

STATEMENT OF THE CASE

On June 9th, 1999, Christopher Banks was indicted by a federal grand jury on four counts of transporting stolen computers across state lines in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2, aided and abetted by William Nieman. On the government's motion, the district court

later dismissed the first two counts. Counts three and four were renumbered Counts One and Two, respectively, when the case went to trial.

The basis of renumbered Counts One and Two were that petitioner knowingly transported stolen computers from Kentucky to Ohio.

STATEMENT OF FACTS

A. Background

Petitioner managed a convenient store owned by his wife who was a registered nurse and also worked at the convenient store.

Petitioner had as his acquaintance, one William Nieman, whom he had known for some eight years prior to the events which gave rise to the charges in this case. Mr. Nieman was employed as a manager at a freight distribution and warehousing operation in Erlanger, Ky. While employed at the location, Nieman stole, and later pleaded guilty to stealing, approximately 150 computers which belonged to IBM and which were in transit to several of their distributors but being temporarily stored at Nieman's place of employment.

B. The Basis of The Indictment.

For three years (1996 to 1999) Mr. Nieman told investigators that he had stolen the computers and sold them to the Petitioner without Petitioners knowledge that they were stolen. In 1999 Mr. Nieman changed his story and told investigators that the Petitioner knew the computers were stolen when he purchased them. Mr. Nieman maintained at all times and testified at trial that he had transported the computers from Count 1 across the

state lines from Kentucky to Ohio. Nieman testified that he had been paid in cash for each sale.

C. Trial Testimony.

At trial, during the government's case in chief, the prosecutor introduced information of the defendant's refusal to talk to the FBI until he had talked to his attorney. FBI agent Dale Cannon told the jury that he and detective Bill Mark went to Petitioner's home in order to speak with him. Agent Cannon then testified that Banks "advised that he didn't want to talk to us, he wanted to talk to his attorney."

The Petitioner felt compelled to testify after the prosecution had made an issue of the Petitioner's pre-trial silence during the government's case-in-chief.

Petitioner stated at trial that he had not known that the computers were stolen when he brokered the sale between the company Mr. Nieman represented (Tech Marketing) and Tom O'Brien who worked for IBM Market Source, a reseller of used IBM computer equipment. Petitioner testified that he had paid Mr. Nieman by check.

The subject of the defendant's silence was broached again while the defendant was being cross-examined after taking the stand in his own defense. The prosecutor, Ms. Voorhees, asked Mr. Banks why he had not cooperated with the government's investigation in the beginning. He replied that he had cooperated by turning over all of the documents requested in a subpoena. Ms. Voorhees then asked, "But what I am talking about, sir, is that when Dale Cannon knocked on your door with Bill Park [sic], asked if you would talk to him, and you told him no -." Defense counsel objected and the court sustained the objection. The district judge thereafter gave the jury the following instruction:

"And the jury is advised that whenever an FBI agent came to Mr. Banks' door and asked to talk to him, he didn't have to talk to him, and that declining to talk with an FBI agent is not the same thing as declining to cooperate with either the FBI or with the Assistant United States Attorney. And, Ms. Voorhees, you are admonished not to make such an implication again."

The jury began deliberations at 11:45 a.m. on April 27, 2000. Four hours after the commencement of deliberations the jury sent a note to the Court in which the jury foreperson, contrary to instruction Number 26, disclosed that two or three jurors were holding out for "not guilty" verdicts based upon reasonable doubt. The foreperson asked for help or suggestions in dealing with the situation. The Court sent back a note indicating that it could not respond and asking if further deliberation would be helpful. The foreperson replied that two jurors were voting not guilty; further deliberation would not change their vote and that neither side could convince the other to change. Defense counsel objected to the giving of an Allen charge and the Court sent the jury back for more deliberation. Defense counsel then moved for a mistrial due to the jury's direct violation of instruction 26 by giving the numerical split of the jury, which motion was overruled. The Court then sent the jury an additional note advising them not to tell the Court how they were divided and asking whether they wished to continue deliberating that night or return tomorrow. The jury responded with a note saying they were close to an answer and requested a copy of the testimony of prosecution witness Tom O'Bryan. The Court then replied that it was not its practice to permit the jury to review trial testimony. The jury foreperson sent back a note to say that without the testimony of witness O'Bryan "we seem to be deadlocked, should we come back tomorrow?" The defense again moved for a mistrial, which was denied. After calling the

jury in and giving the Allen charge the Court added a personal statement, which included the words "after following this last instruction I've given you, as I indicated I hope that you are able to reach a unanimous agreement." The jury then returned, approximately 30 minutes later at 7:30 p.m., from it's continued deliberation with a guilty verdict.

D. The Decision Below.

The Sixth Circuit panel, in affirming the conviction, unanimously determined that the information about the defendant's pre-trial silence should not have been elicited during the government's case-in-chief. The panel determined that there had been plain error at trial but held that the error did not seriously affect the fairness or integrity of the proceedings. This decision was made without benefit of the certified record. The certified record had never been sent to the Court on appeal (Appendix, "C").

The panel was not of one mind as to whether the use of the defendant's pre-trial silence for impeachment purposes was improper. The panel was unanimous in determining that by sustaining the objection to the prosecution's question and instructing the jury as it did, the trial court cured any problem that may have been inherent in the cross-examination.

In his petition for rehearing en banc, Mr. Banks asked the Sixth Circuit Court of Appeals to conduct a Remmer-like hearing to determine whether the violations of substantial rights of the defendant were the cause of his conviction. That petition was summarily denied. (Appendix "B")

LOWER COURT JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and the Sixth Circuit had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Published Opinion Is In Conflict With The Supreme Court's Decision In *Olano* And *Hale* And With It's Own Decision In *Combs*. The Sixth Circuit should have followed these cases and found a violation of Mr. Banks' Fifth Amendment right of silence as well as a violation of this Court's supervisory authority as exercised in United States v. Hale,422 US 171, prohibiting the use of pre-trial silence for impeachment purposes. In addition these violations were intentional and represented serious misconduct on the part of the prosecutor.

In Combs v. Coyle 2000 FED App. 0064 (2000), the Sixth Circuit recognized a significant split between the Circuits over whether the use of the Defendant's pre-trial silence during the government's case-in-chief was a violation of a defendant's fifth amendment right to silence.

A decision on the issues presented in this case would provide the opportunity to maintain uniformity between the various circuits and resolve the conflicts related to the use of a defendant's pre-trial silence within the Federal Courts.

Four Circuits (the 1st, 6th,7th & 10th) have held that use of the defendant's pre-trial silence during the government's case-in-chief violates the privilege against self-incrimination found in the Fifth Amendment.

The 5th, 9th & 11th Circuits have held that use of the defendant's pre-trial silence does not violate the Fifth Amendment privilege against self incrimination.

In Jenkins v. Anderson, 447 U.S. 231 (1980), this Court determined that a state prosecutor may comment

on a defendant's silence if it occurred prior to the time that he is arrested and given his Miranda warnings.

In United States v. Hale, 422 US 171 this Court exercised It's supervisory authority over the Federal Courts to establish a rule that the evidentiary standard for Federal Courts is that prior silence of a defendant or a request for counsel cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to a defendant might result.

ARGUMENTS

I. The Sixth Circuit's Unpublished Opinion Is In Conflict With the Supreme Court's Decision In *Olano, Hale* And The Circuit's Own Decision In *Combs*. The Sixth Circuit Should Have Followed These Cases And Reversed Both Counts Finding That The Violation of the Defendant's Fifth Amendment Right To Silence Affected the Fairness And Integrity Of The Proceedings

The Sixth Circuit Court of Appeals correctly determined that plain error had occurred at the trial level in this case. The decision found that the governments' use of pre-trial silence during the government's case-in-chief violated the defendants Fifth Amendment right to silence and was error.

The panel erred when it determined that this violation did not meet the fourth prong of the plain error test of United States v. Olano, 507 U.S. 725, 732(1993). The fourth prong allows the court to exercise discretion to intervene if the error (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

In the instant case the Petitioner had not yet

determined whether he would testify when the government intentionally made issue of the Petitioner's pre-trial silence.

The prosecutor had every opportunity to bridge the issue of her use of the defendant's pre-trial silence at a pre-trial conference but failed to do so.

The prosecutor's questions directed toward Agent Cannon were intended to bring out the fact that the Petitioner had declined to speak with the FBI and that Petitioner told agent Cannon that he wanted to talk to his attorney. This was an intentional act on the part of the prosecution intended to violate the defendant's Fifth Amendment right to silence.

The author of the court of appeals decision improperly stated the test for determining whether an error seriously affects the fairness, integrity, or public reputation of judicial proceedings. The author wrote; "In other words, "the error must have been prejudicial: [i]t must have affected the outcome of district court proceedings." Olano, 507 U.S. at 734." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 9a,(Appendix "A").

This language is the test given for the third prong of Olano which the panel unanimously agreed had been met.

The Olano decision does not set out a simple standard of review for the fourth prong of the test. It relies on the language set out in United States v. Atkinson, 297 U.S. 157 (1936). The Atkinson Court held that appellate courts should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings".

This Court, in Olano determined that "An error may "seriously affect the fairness, integrity or public

reputation of judicial proceedings" independent of the defendant's innocence. Conversely, a plain error affecting substantial rights does not, without more, satisfy the Atkinson standard, for otherwise the discretion afforded by Rule 52(b) would be illusory."

The Sixth Circuit, without benefit of the certified record, conducted an analysis of the Atkinson language (seriously affect[s] the fairness, integrity or public reputation of judicial proceedings) based on a test that "the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 9a, (Appendix "A").

The author of the decision miss-quoted the Olano decision and as a result the analysis that he performed to satisfy the Atkinson language was faulty. The issue of prejudice while relevant is not determinative. As stated previously, an error may seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. The Olano decision did not consider this fourth prong of the plain error test. The court specifically mentioned that "We need not consider whether the error, if prejudicial, would have warranted correction under the Atkinson standard as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings". *Olano* P 741

The Sixth Circuit, in it's decision in Combs, reasoned that use of the defendant's pre-trial silence seriously affects the fairness of judicial proceedings. "Perhaps most importantly, use of a defendant's prearrest silence as substantive evidence of guilt substantially impairs the "sense of fair play" underlying the privilege." Combs at 46. The Court goes on to say that "the use of a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each

element of the crime." Combs at 46

For the Sixth Circuit to now take a position that the use of pre-trial silence does not seriously affect the fairness, integrity or public reputation of judicial proceedings seems to be totally inconsistent with their own prior holding.

The Sixth Circuit Court of Appeals reviewed the evidence of the case without the benefit of the certified record and made a faulty analysis of both the law and the facts.

The Fifth Amendment to the United States Constitution protects the defendant's right to silence. It has long been heralded by this Court as a fundamental right, which must be protected. In Griffin v. California 380 US 609 at 613 - 615 (1965) , the United States Supreme Court held that prosecutors are prohibited from commenting upon a defendant's assertion of Fifth Amendment rights [refusal to testify at trial], as impermissibly penalizing the exercise of that privilege.

This prosecutor's intentional use of the Petitioner's pre-trial silence was a direct violation of the Sixth Circuit Court of Appeals decision in Combs v. Coyle 2000 FED App. 0064 (2000).

The abridgment of this right clearly affected the fairness, integrity and public reputation of the judicial proceedings. The events, which followed the error, including the decision by the defendant to testify, were all consequential to the error. It is impossible to determine what "would have happened" had the prosecutor not infringed on the defendant's rights.

The subject of the defendant's silence was broached a second time while the defendant was being cross-examined after taking the stand in his own defense.

The prosecutor asked the Petitioner why he had not cooperated with the government's investigations in the beginning. He replied that he had cooperated by

turning over all of the documents requested in a subpoena. The prosecutor then asked, "But what I am talking about, sir, is that when Dale Cannon knocked on your door with Bill Park, asked if you would talk to him, and you told him no-." Defense counsel objected, and the court sustained the objection. The district judge thereafter gave the jury the following instruction:

"And the jury is advised that whenever an FBI agent came to Mr. Banks' door and asked to talk to him, he didn't have to talk to him, and that declining to talk with an FBI agent is not the same thing as declining to cooperate with either the FBI or with the Assistant United States Attorney. And, Ms. Voorhees, you are admonished not to make such an implication again."

The Sixth Circuit Panel was divided as to whether this impeachment use of the defendant's pre-trial silence was a violation of the defendant's rights. They also did not determine whether this action by the prosecutor was a violation of the exercise of the supervisory authority of the Supreme Court over the district courts in the decision of United States v. Hale 422 US 171, 180-181 (1975). In the Hale case this court determined that the evidentiary standard for Federal Courts would be that prior silence of a defendant or a request for counsel cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to a defendant might result.

The panel was unanimous that "by sustaining the objection to the prosecution's question and instructing the jury as it did, the trial court cured any problem that may have been inherent in the cross-examination." *United States v. Christopher Banks*, No. 00-6335(6th Cir. Feb. 5th,2001),Page 7a,(Appendix "A").

Though undisclosed by the panel, the defendant assumes that the majority of the panel was of the opinion

that the impeachment use of the defendant's pre-trial silence was error. The issue discussed here is whether the jury instruction could and did cure the error.

It is the position of this defendant that the impeachment use of the defendant's pre-trial silence was a violation of this Court's exercise of authority as outlined in Hale.

The trial court's attempt at curing the violation was insufficient. The damage was already done and the only available remedy at that time was to declare a miss-trial. The instruction given by the court merely pointed out that Mr. Banks had a right not to talk to the FBI. The instruction which indicated that not talking to the FBI is not the same as not cooperating with the FBI is a distinction without a difference. Clearly not talking to the FBI is the same as not cooperating. The court, by reminding the jury that the defendant had a right to silence simply exacerbated the problem created by the prosecutor who had brought the Petitioner's pre-trial silence before the jury again.

If we follow the logic of the panel, it would never be a violation of the defendant's rights for the prosecutor to comment on the defendant's pre-trial silence or his right not to testify so long as the court issues an instruction to the jury that the defendant has the right not to testify or talk to the FBI.

The damage is done when the prosecutor makes the statement. No instruction from the judge can erase the damage. The prosecutor was given fair warning in Hale not to broach the defendant's pre-trial silence.

Failure of the prosecutor to heed the order of the Supreme Court as exercised in it's supervisory authority over the district court should result in the heavy burden outlined in Chapman v. State of California 386 US 18,17 LED 2d 705 requiring that the court determine and that the prosecution prove that the error was harmless beyond

a reasonable doubt.

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO FIND THAT THERE HAD BEEN SERIOUS PROSECUTORIAL MISS-CONDUCT.

In addition to the prosecutorial miss-conduct outlined above, the Sixth Circuit panel determined that the prosecutor had made misleading statements concerning the evidence presented at trial. They determined that these statements were not flagrant or prejudicial.

During the rebuttal portion of her closing argument, the prosecutor said this:

"Mr. Banks through his attorney wants you to believe that we were at fault or did something wrong by not getting a handwriting exemplar from Mr. Nieman. Why should we have done that, ladies and gentlemen? In the beginning he told us that that was his handwriting, he told us that there's no basis for us to get a handwriting exemplar. We believed what he told us. It was only later when he told us that that wasn't his handwriting, it was Mr. Banks' handwriting."

The exculpatory information that Nieman had told the government that the handwriting on the checks had been his had never been disclosed during discovery. The defense brought a motion to the court to set aside the conviction based on a Brady violation in which the defendant argued that he should have been entitled to the information that Nieman had told the government that he had endorsed the checks, which were the major focal point of the entire trial, during discovery. It was in response to that motion that the prosecution admitted that the statement made in the final closing argument had been false. She admitted that;

1) Nieman never told the prosecution that that was his handwriting.
2) Nieman never told the prosecution that there was no need to get a handwriting exemplar.
3) Nieman never told the prosecution later that that wasn't his handwriting.
4) Nieman never told the prosecution that it was Mr. Banks' handwriting.

The Sixth Circuit panel aped the position of the government that these statements "detracted from Nieman's credibility, the statement may have even bolstered Mr. Banks' position." *United States v. Christopher Banks,* No. 00-6335(6th Cir. Feb. 5th,2001),Page 11a,(Appendix "A").

This is an incredible position for the panel to take. Based on a letter received from the Clerk of the Court (Appendix "C"), the panel had not reviewed the complete record of this case and appears to have accepted the prosecution's spin on these events without independent review. The prosecutor's fabrication of these facts could not have been more damaging to the defendant's case. They bolstered Nieman's prior testimony that he had a change of heart and decided to come forward with the "truth" and added new facts that were never testified to by anyone but the Assistant United States Attorney.

The panel's review of this matter was de novo. As mentioned previously, the panel made this de novo review without access to the certified record (Appendix "C"). The panel pointed out that there was no contemporaneous objection to these statements and applied the flagrancy test outlined in United States v. Francis, 170 F. 3d 546, 549 (6th Cir. 1999). They held that "Since defense counsel did not contemporaneously object to what Ms. Voorhees said in closing argument, we can only reverse on the basis of the misstatement if we find it

tainted by the requisite flagrancy.

The defendant takes exception to both the application of the law and to the de novo findings of fact that the panel used to make its determination.

Petitioner argues that he could not have made a contemporaneous objection without the requisite knowledge that the statements were false. The defense was not privy to the conversations that took place between Mr. Nieman and the prosecution.

Had the Defendant and his counsel been aware that AUSA Voorhees was presenting false and misleading testimony to the jury, he would surely have objected.

Had the objection been made and the trial court been made aware that the information was false and misleading, the trial court would no doubt have attempted to admonish the jury to disregard the information or declared a miss-trial. The information Ms. Voorhees presented was inflammatory and tended to prejudice the jury against the defendant.

Upon receipt of the government's admission that it had argued false evidence the defendant renewed his request for a new trial or judgment of acquittal.

The argument by a prosecutor of facts not of record, in the guise of the prosecutor's direct personal knowledge, and which facts are false, is serious misconduct.

This Court has stated that a defendant has the right to have his guilt decided solely on the evidence properly presented to the jury, without suggestion of other evidence known to the prosecutor. United States v. Young 470 US 1, 18, 84 L Ed 1, 105 S Ct 1038. That Court condemned direct manipulation or misstatement of evidence by prosecutors. Darden v. Wainwright 477 US 168 at 172, 91 L Ed 144, 106 S Ct 2464.

Prosecutor Voorhees' argument combined the statement of facts not presented at trial, the presentation

of false information and the implication that the prosecution possessed special knowledge. Such remarks are condemnable on any one of these three basis of impropriety because they are so misleading to a jury and prejudicial to a defendant. "Improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 US 78 at 87 (1935).

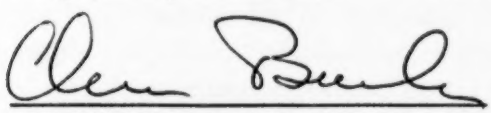
The facts of this case support a finding of serious prosecutorial misconduct.

The jury in this case was not convinced that the evidence was overwhelming. At least three jurors were holding out as "not guilty" for the majority of the deliberations. Only after pressure from the judge (who knew the numerical split of the vote of the jurors) in the form of an Allen charge and a personal plea from the judge did the jury reach a unanimous verdict.

CONSLUSION

These questions are appropriate for the Writ because they are of exceptional constitutional import: the defendant's right to silence and the right to a fair trial free of serious prosecutorial misconduct.

Respectfully submitted: November 12, 2002.



CHRISTOPHER BANKS, PRO SE
Inmate # 07073-032
Talbert House
2216 Vine Street
Cincinnati, Ohio 45202
(513) 608-1211

CERTIFICATE OF MAILING - PROOF OF SERVICE

Christopher D. Banks, Pro Se, declares under penalty of perjury that the following is true and correct:

That in accordance with rule 29(2), Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox the original and ten (40) copies of Petitioner's Petition for Writ of Certiorari to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29.5, Supreme Court Rules, two copies of this Petition for Writ of Certiorari have this 12th day of November, 2002, been properly deposited in a United States Post Office to AUSA Laura Voorhees, United States Attorney's office, P.O. Box 72, Covington, KY 41012-0072.

Executed this 12th day of November 2002.



Christopher David Banks, Pro SE
Inmate # 07073-032
Talbert House
2216 Vine Street
Cincinnati, Ohio 45202
(513) 608-1211

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
No. 00-6335

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of AMERICA	)
	)
Plaintiff - Appellee,	)
	)
v.	) ON APPEAL FROM
	) THE UNITED
CHRISTOPHER BANKS,	) STATES DISTRICT
	) COURT FOR THE
Defendant-Appellant.	) EASTERN
	) DISTRICT OF
	) KENTUCKY

Before: NELSON and MOORE, Circuit Judges, and KATZ, District Judge.*

DAVID A. NELSON, Circuit Judge. Found guilty by a federal jury on two counts of transporting stolen computers across state lines in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2, the defendant was sentenced to imprisonment for a term of 33 months. He now appeals his conviction and sentence, contending, among other things, that he was the victim of prosecutorial misconduct and that the introduction of evidence of his refusal to talk with federal investigators violated his Fifth Amendment privilege against self-incrimination.

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*The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

We conclude that there were occasions during the trial when the prosecutor overstepped the bounds of propriety, and we agree with the defendant that the prosecutor should not have elicited evidence, during the government's case-in-chief, of the defendant's unwillingness to speak to the investigators. In light of the record as a whole, however, and given the inherent improbability of the defendant's contention that he did not realize the computers had been stolen, we conclude that the errors were harmless. Accordingly, and because we find no error in the district court's calculation of the sentence under the sentencing guidelines, we shall affirm the challenged judgment.

I

Christopher Banks, the defendant, is an attorney whose primary business is the operation of a lottery ticket store and U-Haul rental establishment in Cincinnati, Ohio. Mr. Banks was a social acquaintance of William Nieman, who worked as an inbound freight manager for a freight forwarder in Erlanger, Kentucky .Each month, six or seven truckloads of IBM Thinkpad laptop computers passed through the freight forwarder's facilities; some of the computers arrived without proper documentation. Beginning in July of 1996, Mr. Nieman stole approximately 150 undocumented computers from six different IBM shipments.

Thanks to Mr. Banks, Mr. Nieman did not find it difficult to dispose of the stolen computers. Nieman initially offered to give Banks a laptop in satisfaction of a $500 gambling debt, according to Nieman's account at trial. Nieman testified that he told Banks the computer had been stolen from the forwarder's freight dock; that after inspecting the computer, Banks agreed to accept it as payment for the debt; and that Banks told Nieman to let him know if any more computers became available.

Mr. Nieman made four subsequent deliveries of stolen computers to the defendant. The final transaction occurred on Sunday, October 6, 1996, when Defendant Banks picked up 106 computers from the freight dock and drove them back to Cincinnati in a U-Haul. (All but six of these computers appear to have been in unopened boxes.) In total, Nieman sold Banks between 141 and 150 IBM Thinkpad computers for $52,500. Mr. Banks - to whom none of the computers was ever invoiced - resold the machines at prices reflecting large markups.

Mr. Nieman testified that he asked Mr. Banks what Banks was telling his customers about the origin of the equipment. Banks allegedly replied that he told them he was liquidating the computers for a company called Tech Marketing, which was going out of business. There was no such company, of course.

The first person to whom Mr. Banks offered computers was Steve O'Bryan. It is uncontested that Steve O'Bryan was told that the computers belonged to "Tech Marketing" and that this company was liquidating its inventory. Agreeing to an initial purchase of 15 computers, Steve O'Bryan contacted his father, Tom O'Bryan, to arrange financing. Tom O'Bryan took some of the serial numbers and called IBM, he testified at trial, to make sure that the serial numbers were consistent with the model numbers and that the machines were configured as represented. IBM said nothing about the computers having been stolen. Steve O'Bryan subsequently paid Banks $12,000 for the 15 machines.

Early in September of 1996, Banks told Tom O'Bryan that he had seven more computers for sale. O'Bryan agreed to buy them for $6,700, paying with a check drawn to the order of Tech Marketing. He purchased another 20 computers a week later, again making the check payable to Tech Marketing. In October

of 1996, Tom O'Bryan agreed to buy an additional 100 computers for $250,000. He picked up the computers from the defendant's place of business in Cincinnati, but paid only $40,000 of the agreed price. The O'Bryans sold the computers to Computer Products Corporation, at a price of $511, 750, and that company resold them to users throughout the United States at prices totaling $697,135.

Meanwhile, the freight forwarder's principal had reported as stolen 100 of the computers picked up by Mr. Banks on October 6, 1996. By tracing the serial numbers to Computer Products' customers, the FBI followed the trail back to Messrs. Nieman and Banks. Mr. Nieman testified that while the FBI's investigation was ongoing, he and Defendant Banks had numerous conversations about covering up Banks' role in the affair. Tom O'Bryan cooperated in the government's investigation, and he was promised that he would not be prosecuted.

In April of 1998 Mr. Nieman pleaded guilty to stealing the computers; he agreed to testify against Mr. Banks in exchange for a decreased sentence pursuant to U.S.S.G. § 5k1.1. On June 9, 1999, Mr. Banks was indicted by a federal grand jury on four counts of transporting stolen computers across state lines in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2, aided and abetted by William Nieman. On the government's motion, the district court later dismissed the first two counts. Counts Three and Four were renumbered Counts One and Two, respectively, when the case went to trial.

Defendant Banks took the stand at trial, giving testimony that contradicted Nieman's on key points. Mr. Banks testified that his first interaction with Mr. Nieman concerning computers occurred when Nieman asked him to repair an IBM Thinkpad. Banks said that after making the repairs he offered to buy the computer for $1,000, paying $500 in cash and forgiving Nieman's $500

gambling debt. Banks further testified that he asked where Nieman had got the computer and was told that it came from Tech Marketing, a company that was closing its offices and was returning computers to the freight forwarder.

In describing his subsequent transactions with Mr. Nieman, Mr. Banks claimed that computers came in open boxes and were already registered to Tech Marketing. Mr.

Banks also testified that he had his buyers make out checks to Tech Marketing for the reason that Nieman told him that his contact at Tech Marketing, Paul Keller, wanted to be paid in cash. Banks said that he gave these checks to Nieman, who would return several days later with the checks endorsed. The checks would then be cashed at Banks' lottery store, with Banks taking his markup out of the proceeds and the rest of the cash being turned over to Nieman. Banks further testified that not until after the FBI began its investigation did Nieman tell him the computers had been stolen.

The jury ultimately found Banks guilty on both of the counts against him. The court sentenced him to imprisonment for a tern of 33 months, to be followed by supervised release. He was also ordered to make restitution in the amount of $205,000 and to pay a special assessment of $200. Mr. Banks has appealed his conviction and sentence, presenting six assignments of error.

II

A

When FBI investigators first approached Mr. Banks, he declined to speak with them. This fact came out at two

points during the trial, and Banks argues that his Fifth Amendment privilege against self-incrimination was violated as a result.

During the government's case-in-chief, sometime FBI Agent Dale Cannon testified about the investigation he conducted in December of 1996. In the course of his testimony agent Cannon told the jury that he and Detective Bill Mark went to Banks' home in order to speak with him. At this point the prosecutor, Ms. Laura Voorhees, asked Cannon the following question: " And what happened when you went to the door?" Cannon responded that Mr. Banks "advised that he didn't want to talk to us, he wanted to talk to his attorney." Defense counsel did not object, and the witness was immediately passed for cross-examination.

Defense counsel began his cross-examination by asking; "Former Agent Cannon, you've been around the block long enough to know that a person doesn't have to talk to you just because you are an FBI agent, right?" Cannon replied in the affirmative.

The subject of the defendant's silence was broached again while the defendant was being cross-examined after taking the stand in his own defense. Ms. Voorhees asked Mr. Banks why he had not cooperated with the government's investigation in the beginning. He replied that he had cooperated by turning over all of the documents requested in a subpoena. Voorhees then asked, "But what I am talking about sir, is that when Dale Cannon knocked on your door with Bill Park [sic], asked if you would talk to him, and you told him no -." Defense counsel objected, and the court sustained the objection. The district judge thereafter gave the jury the following instruction:

> "And the jury is advised that whenever an FBI agent came to Mr. Banks' door and asked to talk to him, he didn't have to talk to him, and that declining to talk with an FBI agent is not the same thing as declining to cooperate with either the FBI or with the Assistant United States Attorney. And, Ms. Voorhees, you are admonished not to make such an implication again."

An argument can be made that the government was entitled to attempt to impeach the defendant's credibility by asking him on cross-examination about his refusal to speak with the investigators. See *Combs v. Coyle,* 205 F.3d 269,281 (6th Cir.), *cert. denied,* __U.S. __,121 S.Ct.623 (2000) 281, where we said (citing *Jenkins v. Anderson,* 447 U.S. 321,236 (1980)) that "permitting the impeachment use of a defendant's prior silence does not unconstitutionally burden the exercise of Fifth Amendment rights." See also *Seymour v. Walker,* 224 F.3d 542,560 (6th Cir. 2000) (when a defendant chose to testify in her own defense, "[t]he prosecutor...had a legitimate interest in impeaching her testimony and in not allowing Seymour to use the Fifth Amendment as a sword rather than a shield"). The members of the panel are not of one mind as to the validity of this argument under the present circumstances. The panel is unanimous, however, in the view that by sustaining the objection to the prosecution's question and instructing the jury as it did, the trial court cured any problem that may have been inherent in the cross-examination.

The panel is also unanimous in the view that the information about the defendant's silence should not have been elicited during the government's case-in-chief. The government argues that Agent Cannon's testimony on direct examination was permissible because it was merely being used for impeachment purposes. The prosecution

maintains that the defendant put his credibility at issue during his lawyer's opening statement, when the jury was told that Mr. Banks would testify that he did not know the computers were stolen. Mr. Banks had not yet taken the stand when Agent Cannon testified, however, and the government's anticipatory impeachment theory seems to have no support in the case law. The better view, we believe, is that the prosecution was attempting to use Mr. Banks' silence as substantive evidence of guilt. This the Constitution prohibits: "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination." *Combs*, 205 F.3d at 283.

Although Agent Cannon' s testimony was impermissible, it remains to be determined whether Mr. Banks is entitled to a new trial on this score. Since there was no objection, we must apply plain error analysis. See Fed. R. Crim. P. 52. 1

To correct an error not raised at trial, there must be: (1) error, (2) that is plain and (3) that affects substantial rights. If these conditions are met, we may exercise our discretion to intervene if the error (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial

---

1 Rule 52 provides as follows:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. "

proceedings." See *United States v. Olano,* 507 U.S. 725,732(1993).

We shall assume, for purposes of analysis, that the error committed by the government during its case-in-chief qualifies as "plain" error. In order for us to set the conviction aside, under this hypothesis, it would still be necessary for us to conclude that the error affected the fairness or integrity of the proceedings. In other words, "the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." *Olano,* 507 U.S. at 734.

We find no reasonable likelihood of prejudice from Agent Cannon' s testimony. In light of the record, Mr. Banks' contention that he was unaware the computers were stolen is wildly improbable.

No reasonably prudent businessman-attorney could have thought it likely that the true owner (1) would deputize a freight forwarder's employee to liquidate hundreds of thousands of dollars' worth of computers on the fly, (2) would have him do so without issuing any documentation, and (3) would then have the employee pocket the proceeds in cash. It is true, as we shall see, that the jury initially encountered difficulty in reaching a unanimous verdict in this case, but the fact remains that the evidence against Mr. Banks was little short of overwhelming.

B

Mr. Banks contends that the prosecutor made a series of statements that constituted deliberate acts of misconduct and so tainted the trial that reversal by this court is warranted. Our review of this matter is *de novo. United States* v. *Clark,* 982 F .2d 965, 968 (6th Cir. 1993).

Our first task in reviewing prosecutorial misconduct claims, not surprisingly, is to determine whether the prosecutor's statements were in fact improper. *United States* v. *Francis,* 170 F .3d 546,549 (6th Cir. 1999). If the statements appear improper, we then look to see whether they were flagrant. *Id.* (citing *United States* v. *Carroll,* 26 F.3d 1380,1388 (6th Cir. 1994)). This court's standard for flagrancy is: "(1) whether the statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused." To reverse a conviction on the basis of an improper, non-flagrant statement we must determine that: "(1) the proof of the defendant's guilt is not overwhelming; (2)the defense counsel objected; and (3) the trial court failed to cure the impropriety by failing to admonish the jury." *Id.* at 550. Whether a prosecutor's misbehavior was prejudicial must be decided in the context of the entire trial. See *United States v. Young,* 470 U.S.l, 11 (1985).

1. Nieman ' s Handwriting Exemplar

One of the issues at trial was whether it was Defendant Banks or his friend Mr. Nieman who endorsed the checks made out to Tech Marketing. Banks testified that Nieman told him that he, Nieman, had signed "Tech MKT" on the backs of the checks. Nieman denied having said this and denied having made the endorsements. As part of the investigation the government obtained a handwriting exemplar from Banks but not from Nieman. No handwriting expert testified at trial as to whether Mr. Banks' handwriting matched the endorsements .

During the rebuttal portion of her closing argument, the prosecutor said this:

> "Mr. Banks through his attorney wants you to believe that we were at fault or did something wrong by not getting a handwriting exemplar from Mr. Nieman. Why should we have done that, ladies and gentlemen? In the beginning he told us that that was his handwriting, he told us that there's no basis for us to get a handwriting exemplar. We believed what he told us. It was only later when he told us that that wasn't his handwriting, it was Mr. Banks' handwriting."

The prosecutor's statement was untrue; Nieman never told the government that he had endorsed the checks, nor was any such evidence presented at trial. In a subsequent filing with the district court, the prosecutor admitted that she had been mistaken. The defendant argues that Ms. Voorhees' false statement constitutes serious prosecutorial misconduct that requires reversal.

Since defense counsel did not contemporaneously object to what Ms. Voorhees said in closing argument, we can only reverse on the basis of the misstatement if we find it tainted by the requisite flagrancy. See *Francis*, 170 F.3d at 550. We do not believe it was so tainted. What Ms. Voorhees said was certainly misleading, but we do not think it was particularly prejudicial. Because it detracted from Nieman ' s credibility, the statement may even have bolstered Mr. Banks' position. Although Ms. Voorhees obviously should have been more familiar with the facts of her case than she appears to have been, moreover, we cannot say that her lapse was deliberate. And although this was not her only lapse, it came in the context of a very strong government case - a case which, if properly presented, should have posed no particular problem for the prosecution.

2. Handwriting Comparisons

The government elected not to call a handwriting expert and to let Mr. Banks' handwriting exemplar and the endorsed checks speak for themselves. The defense contends that Ms. Voorhees attempted to make up for the absence of expert testimony by repeatedly making the jury aware of her personal opinion that Mr. Banks' handwriting matched the endorsements on the checks.

During cross-examination of Mr. Banks, the following colloquy occurred:

> Q. "Would you agree with me that your block printing on this handwriting exemplar looks very similar to what appears on the back of all of these checks?
>
> A. No I won't. I mean it's somewhat similar but it's not my underwriting.
>
> Q. You could understand why I might think it was, couldn't you?
>
> A. You are entitled to have your own opinion."

No objection was made. Later, during her rebuttal closing argument, Ms. Voorhees said this:

> "But when you look at that handwriting exemplar and you compare it to the endorsement on the backs of those checks, I

> submit that that shows that those endorsements are virtually identical. And it is that fact alone that destroys the defendant's defense. Bill Nieman did that or Paul Keller or somebody on Mr. Nieman' s behalf. Those are in fact his endorsements, and it is the way Mr. Nieman told you it occurred, that Mr. Banks was the one that thought up this scheme, came up with the plan of Tech Marketing. He's the one with all the knowledge about Tech Marketing. And I submit to you that Mr. Nieman's testimony was accurate, that this was Mr. Banks' idea, thereby establishing to you ladies and gentlemen that he knew these computers were stolen...."

As to the cross-examination, Ms. Voorhees' use of the phrases "agree with me" and "I might think" may have come close to the improper expression of a personal opinion. It probably did not cross the line, however, and if there was any impropriety in the form of the questions, it was far from flagrant.

As to the closing argument, we see no impropriety. With or without expert testimony, juries are allowed to make their own comparisons of handwriting in documents admitted in evidence. See *United States v. Woodson*, 526 F .2d 550,551 (9th Cir. 1975); see also *United States v. Sivils*, 960 F .2d 587, 592-593 (6th Cir. 1992). It was not impermissible for Ms. Voorhees to "submit" to the jury that the comparison favored the government and that Nieman's testimony was accurate. As we explained in *United States v. Stulga*, 584 F .2d 42, 147 (6th Cir. 1978), the phrase "I submit" is not the equivalent of expressing a personal opinion; rather, it should be interpreted to mean

"I submit that upon the facts as shown by he evidence." (Internal quotations omitted.)

3. Bolstering of Tom O'Bryan's Credibility

In rebuttal closing argument, Ms. Voorhees said the following:

> "There wasn't sufficient evidence to prosecute Mr. O'Bryan and he was simply told that he wasn't going to be prosecuted. That was long after he had given evidence regarding his specific conversations with Mr. Banks. There was no motivation for him at that point to make up those stories such as Mr . Banks would like to have you believe occurred. He simply was told that he wasn't going to be prosecuted."

No objection was made by defense counsel.

The record did not show that there was insufficient evidence to prosecute Mr. O'Bryan. Several factors, however, lead us to conclude that there was no flagrant impropriety in this connection. First, Ms. Voorhees' argument is generally consistent with Mr. O'Bryan's testimony at trial. Second, the accuracy of O'Bryan's testimony been admitted, defense counsel having said this during his closing argument:

> "the government gave Mr. O'Bryan a free pass, told him that he would not be prosecuted. But, you know, I heard Mr. O'Bryan testify and I thought he was quite candid. I thought the things he said were not hurtful to Chris."

Third, the district court gave the jury two cautionary instructions. The morning after O'Bryan's testimony, the court reminded the jury that the governrnent had promised not to prosecute him. The court then went on to say this:

> "It is permissible for the government to make such promises, but you should consider Mr. Nieman's and Mr. O'Bryan's testimony with more caution than the testimony of other witnesses. Consider whether their testimony may been influenced by the government's promise."

This instruction was repeated in the court's general charge, further minimizing any risk of prejudice.

4. IRS Record-Keeping Comments

In his final allegation of prosecutorial misconduct, the defendant submits that during cross-examination and closing argument the prosecutor made references to the IRS that were improper because no evidence was presented as to IRS record-keeping requirements; the prosecutor's statements, it is claimed, reflected nothing more than her personal opinion.

In her closing, the prosecutor made this argument:

> "And the IRS is going to believe him based on what he claimed. It doesn't matter what's in his books or on the account or something like that. It's really what he claims to the IRS that matters. That, ladies and gentlemen, is absolutely incredible."

No objection was made. The prosecutor later made the following observation:

> "Any person, the IRS or anybody else that wanted to find out what had happened, they couldn't tell at all by looking at those bank statements and seeing the bank statements what Mr. Banks would have in his hands to show or try to represent to people that he didn't receive this money ."

At this point defense counsel objected to the numerous references to the IRS. In response the district judge cautioned the jury as follows: "Members of the jury, you're instructed that no charge in this case relates to the IRS. The only charges are knowing transportation, knowing interstate transportation of stolen goods."

We do not consider the IRS references to have been improper expressions of personal opinion. The prosecutor was attempting to demonstrate that Mr. Banks' poor record-keeping strengthened the conclusion that he knew the computers were stolen. Most people know that the IRS requires businesses to keep adequate financial records, and there was ample reason to question whether the defendant had done so here. In any event, the district judge's cautionary instruction minimized whatever potential problem there may have been in this regard.

C

Next, Mr. Banks contends that the district court erred in its handling of a situation that arose after the jury retired to deliberate.

After about four hours of deliberations, the jury foreperson sent the district judge a note asking for help because the jury was deadlocked as a result of two or three jurors holding out for a verdict of not guilty. The judge asked if further deliberations would be helpful. The foreperson responded that two jurors had said that further deliberations would not change their vote for acquittal. Defense counsel then moved for a mistrial on the grounds that this response violated an instruction against disclosing a vote split during deliberations. The court denied the motion but cautioned the jury not to do it again.

Ultimately, following the denial of a request by the jury to review Tom O'Bryan's testimony and without objection by the defendant, the court gave a standard-form *Allen* charge.2 After giving the charge, the district judge commented to the jury that "as I indicated I hope you are able to reach a unanimous agreement. You may be able to, you may not be able to....."

This court reviews the denial of a motion for a mistrial for abuse of discretion. *United States* v. *Atisha,* 804 F. 2d 920, 926 (6th Cir. 1986). Here we see no abuse of discretion in the denial of the motion for a mistrial after the jury's numerical split was disclosed.

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2 An *Allen* charge is a "supplemental instruction designed to encourage the jury to reach a verdict by requesting each juror to reconsider his or her respective position during continued deliberations. The name comes from *Allen* v. *United States,* 164 U.S. 492 (1896), (here the Supreme Court approved such an instruction." *United States* v. *Frost,* 125 F.3d 46,373 (6th Cir. 1997).

The district judge did not know which two jurors were in the minority and could for coercive pressure.

Given the absence of a timely objection, we find no reversible error in-the court's charge. As we explained in *United States* v. *Lash,* 937 F .2d 1077, 1086 (6th Cir. 1991) (citations omitted), *Allen* charges have generally been upheld where the jury has disclosed a split *sua sponte* and the instructions have not targeted the minority. In the case at bar the jury revealed its split spontaneously, with no solicitation from the court, and the instruction directed both the majority and the minority to reconsider their positions. The instruction was not aimed solely at the minority , and was thus not coercive.

Furthermore, "we traditionally have found an *Allen* charge coercive when the instructions themselves contained errors or omissions, not when a defendant alleges that the circumstances surrounding an otherwise correct charge created coercion." *Frost,* 125 F.3d. The allen charge given here closely followed Sixth Circuit Pattern Criminal Jury Instruction 9.04 and contained no errors or omissions. The defendant contends that the judge's expression of hope for a unanimous verdict rendered the charge coercive, but we do not find the contention persuasive. The judge's comment came in the context of an explanation that it would be perfectly acceptable for the jurors not to reach a unanimous verdict and that they should deliberate at their own pace.

D

In his fourth assignment of error, the defendant claims that the government presented evidence to sustain his conviction because there was no proof that he caused the transportation of the goods in interstate commerce. We review sufficiency of the evidence to determine "whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Martin,* 920 F .2d 345, 348 (6th Cir. 1990) (citations omitted). We believe a rational jury could have decided that Mr. Banks was responsible for the interstate transportation of the computers referred to in both counts of the amended indictment.

Count One dealt with 17 computers delivered to the defendant by Mr. Nieman. Nieman testified that he transported the computers from the freight forwarder's dock in Kentucky to Mr. Banks' place of business in Cincinnati, Ohio. The defendant argues that there was no proof that he caused Nieman to bring the computers across the state line. The argument leaves us unconvinced. As the Second Circuit explained in *United States* v. 90 F .2d 244,248 (2d Cir. 1968), *reversed and vacated on other grounds,* 394)69), "(tJhere can be no doubt that a defendant may be found to be a 'cause' if the result which the law forbids was reasonably foreseeable." The jury was entitled to find Mr. Banks the cause-in-fact of the computers having moved in interstate commerce because it was reasonably foreseeable that when Banks agreed to buy the computers from Nieman the latter would transport them across the state line. The jury could have also inferred that defendant directed Nieman to deliver the computers from Kentucky to Ohio to complete the sale.

As to the 106 computers dealt with in Count Two, Mr. Banks himself testified that he picked up the computers in question from the freight forwarder's facility in Kentucky on a Sunday, put them in storage, and did not look at them again until they were turned over to Mr. O'Bryan the following Friday. O'Bryan testified that he took possession of the computers in Cincinnati. From this testimony, we believe a jury could reasonably have

inferred that defendant transported the computers from Kentucky and placed them in storage in Cincinnati, Ohio.

E

Mr. Banks argues next that the district court committed reversible error in giving the jury the following "deliberate ignorance" instruction, an instruction based on Sixth Circuit Pattern Jury Instructions 2.09:

> "No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the - defendant deliberately ignored a high probability that the computers he received from Bill Nieman were stolen, then you may find that he knew the computers had been stolen.
>
> But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the computers had been stolen, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, negligence, or foolishness on his part is not the same as knowledge, and is not enough to convict...."

We review a district court's choice of j we reverse only when the jury charge fails acc v. *Beaty*, 245 F.3d 617,621 (6th Cir. 2001) (citations omitted)

Mr. Banks contends that the deliberate ignorance instruction given here was improper in light of the

government's proof that he had actual knowledge that the computers were stolen. The contention is without merit. In *United States v. Mari 47 F.3d 782, 786 (6th Cir. 1995),* we held that when a district court gives a deliberate ignorance instruction that does not misstate the law but is unsupported by the evidence, the error is ipso facto harmless. We do not think that the court erred in giving the deliberate ignorance instruction here, but if we are wrong in this it is clear, under *Mari,* that any error was harmless.

Relying on a Second Circuit case, Mr. Banks further argues that the instruction was defective because it failed to include a proviso informing the jury that it could not find deliberate ignorance if it concluded that the defendant actually believed the goods were not stolen. See *United States* v. *Sicignano,* 78 F .3d 69,71 (2d. Cir. 1996). Such a proviso is required by Second Circuit precedent, and both parties in Sicignano asked that the instruction include it. *Id.* There is no corresponding Sixth Circuit precedent, and as far as the record reveals defense counsel never requested inclusion of the proviso here. Mr. Bank's argument is thus unpersuasive.

F

Finally, Mr. Banks argues that the district court erred in its calculation of the amount of the loss attributable to his conduct under U.S.S.G. § 2B1.1 and failed to make specific findings in this regard, as required by Fed. R. Crim. P. 32(c)(I). See *Monus,* 128 F.3d at 396. We review the district court's calculation of loss for clear error, and we give due deference to the court's application of the guidelines to the facts. *United States v. Jackson,* 25 F.3d 327,330 (6th Cir. 1994)

At Mr. Bank's sentencing hearing, the district judge explicitly found the amount of the loss to be $684,800 (rounding from $684,833), based on the testimony of IBM Security Investigator Chris Ferracane. At trial, Ferracane testified that IBM had sold the computers in Count One for $65,433 and the computers in Count Two for $619,400. The sum of these two amounts is $684,833, which shows that contrary to a suggestion by Mr. Banks, the district court did not include the value of computers from the dismissed counts.

Mr. Banks further maintains that the district court should have used wholesale prices to determine the amount of loss rather than retail prices. But as Application Note 2 to U.S.S.G. § 2B1.1 explains, "'Loss' means the value of the property taken, damaged or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue." The standard test for determining the market value of stolen property is "the price a willing buyer would pay a willing seller at the time and place the property was stolen." *United States v. Warshawsky*, 20 F .3d 204, (citations omitted). The district court was able to put the fair market computers at $684,833 because IBM had already sold the computers for that price by the time they were stolen. Accordingly, we find no error in the court's calculation of the loss.

The judgment of conviction and sentence is **AFFIRMED.**

APPENDIX B

No. 00-6335

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of AMERICA	)	FILED
	)	APR 04 2002
Plaintiff - Appellee,	)	LEONARD
	)	GREEN,
v.	)	CLERK
	)	
CHRISTOPHER BANKS,	)	**ORDER**
Defendant-Appellant.	)	

Before: NELSON and MOORE, Circuit Judges, and KATZ, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied .

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

*The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

PATRICIA ELDER
(513) 564-7034
www.ca6.uscourts.gov

Filed: April 15, 2002

Leslie G. Whitmer
Eastern District of Kentucky at Covington
35 W. Fifth Street
Suite 289, P.O. Box 1073
Covington, KY 41011

RE: 00-6335
USA vs. Banks
District Court No. 99-00044

Enclosed is a copy of the mandate filed in this case. The certified record was never sent to this Court on appeal.

Very truly yours,
Leonard Green, Clerk

(Ms.) Patricia J. Elder
Case Manager

cc: Honorable Jennifer B. Coffman
Ms. Laura K. Voorhees
Mr. W. Robert Lotz
Mr. Christopher Banks

APPENDIX D

Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.